

Title	Contracting: Limitation on Intrabranh Contracting and on Contracting With Former Employees (adopt Cal. Rules of Court, rules 6.103 and 6.104)
Summary	Proposed rule 6.103 would prohibit current employees of any court or the Administrative Office of the Courts (AOC) from contracting with other judicial branch entities to provide goods and services. Proposed rule 6.104 would limit contracting with former employees of the courts and the AOC.
Source	Trial Court Presiding Judges Advisory Committee
Staff	Mark Jacobson, 415-865-7898
Discussion	<p>These proposed rules are designed to prevent self-dealing and favoritism, and the public perception thereof, in the awarding of contracts within the judicial branch. There are existing statutes that address these matters for other branches of state government, but these statutes do not apply to the judicial branch.</p> <p>Proposed rule 6.103, limiting contracting with current judicial branch employees, is modeled on Public Contract Code section 10410, which does not apply to the judicial branch. Section 10410 restricts the ability of state employees to contract with other state agencies. Because the public is likely to perceive all entities of the judicial branch as a single entity, there is the possibility that the public would consider intrabranh contracting by current employees of the judicial branch to be inappropriate. There is also the possibility that some of these contracts might, in fact, result from self-dealing and favoritism. Proposed rule 6.103 would promote the integrity of contracting by judicial branch entities by prohibiting current employees from intra-bran h contracting unless the activity is required as a condition of the employee's regular judicial branch employment. The rule would not prohibit any person from being employed by more than one judicial branch entity. Furthermore, because some interpreters, commissioners, and court reporters may be employed part time by one court and provide services on a contractual basis to another, these categories of employees are excluded from the prohibition.</p> <p>Proposed rule 6.104, on contracting with former judicial branch employees, is modeled on Public Contract Code section 10411. That statute restricts the ability of a former state employee to contract with his or her former employer for a certain period of time. A similar rule that applies to the judicial branch is needed because of concern, particularly public perception, about former judicial branch employees</p>

contracting with their former employers immediately after leaving the branch. The rule would prevent employees of the trial courts and the appellate courts from using their judicial branch employment to benefit financially after leaving that employment by contracting to provide consulting or other services to their former courts. The rule would also prevent employees of the AOC from using their AOC employment to benefit financially after leaving the agency by contracting with the courts or with the AOC.

Proposed rule 6.104 would prohibit any court, for a two-year period, from contracting with a former employee who participated in any way in the process of making the contract while an employee. It would also prohibit, for a one-year period, (1) a court from contracting with former AOC employees and former employees of that particular court who had held “policymaking positions,” and (2) the AOC from contracting with former AOC employees who had held policymaking positions. The rule would not prohibit courts from contracting with former employees of other courts, and the prohibition would not include former judges and justices.

Finally, the rule would not prohibit employment of any former employees by the courts or the AOC. Under most county retirement systems in California, former employees may be employed as retired annuitants for up to 960 hours, or 24 weeks per year, without incurring any penalty. In some counties, the limit beyond which a penalty attaches is 720 hours, or 18 weeks. With a rule prohibiting contracting with but permitting employment of certain former employees, a court or the AOC could avoid possible pressure to pay exorbitant consulting fees while still having the opportunity to use the services of the retired employee. In addition, the court or the AOC would not be subject to the limitations of an independent contractor relationship and would have greater control over the work of the person as an employee.

The term “policymaking position” as used in Public Contract Code section 10411 is not defined in any case law. Therefore, proposed rule 6.104 defines the term to include specified executive-level positions and also allows each court and the AOC to identify additional positions to which the prohibition would apply. Because the purpose of the rule is to prohibit future contracts with persons whose positions at the court or agency would allow them to establish policies that could benefit them post-employment, it is reasonable to include at least executive-level positions. However, because classifications and duties of positions in each court vary, the rule would allow the courts

and the AOC to designate which positions are “policymaking.”

Members of the Court Executives Advisory Committee raised several questions about the prohibition on contracting with former employees in proposed rule 6.104. Comments are specifically invited on these questions.

Some members questioned whether the rule should also prohibit courts or the AOC from contracting with entities that employ former court or AOC employees who otherwise might be barred from contracting with the courts or the AOC under the rule. For example, a former employee might set up a consulting company upon retirement or might become employed by a large firm. Members questioned whether the rule should specify whether the courts or the AOC could contract with a former employee’s consulting firm or with a large firm that employs a former employee as the lead person on a project.

Second, committee members questioned whether a good faith exception should be incorporated into the rule, allowing courts and the AOC to contract with former policymaking employees in special circumstances. For example, if a court cannot employ a former policymaking employee because it needs more than the 24 weeks permitted without penalty by the retirement system (or 18 weeks, depending on the applicable system) to find and train a new employee in a policymaking position, some committee members believe the court should have some flexibility in contracting with a former employee. Another example is when a court wants to contract with a former employee with special skills and knowledge who had worked on a specialized ongoing court project, and the former employee needs more than 24 (or 18) weeks to complete that project. Some committee members questioned whether the rule should contain an exception under which the court would be able to contract with the former employee in these and other possible special circumstances.

Finally, some committee members questioned whether the rule should more clearly define the term “policymaking position” in order to avoid inconsistent practices among the trial courts.

The text of the new rules is attached.

Attachment

Rule 6.103 of the California Rules of Court would be adopted effective January 1, 2004, to read:

Rule 6.103. Limitation on intrabranch contracting

(a) [Definitions] For purposes of this rule, “judicial branch entity” includes a trial court, a Court of Appeal, the Supreme Court, and the Administrative Office of the Courts.

(b) [Application] This rule does not apply to:

(1) Part-time commissioners, with respect to services as a commissioner;

(2) Part-time court interpreters who are not subject to the cross-assignment system under Government Code section 71810, with respect to interpreter services provided to a court; and

(3) Part-time court reporters, with respect to reporter services provided to a court.

(c) [Intrabranch limitations] An employee of a judicial branch entity must not:

(1) Engage in any employment, enterprise, or other activity

(A) from which he or she receives compensation or in which he or she has a financial interest, and

(B) which is sponsored or funded by any judicial branch entity through or by a contract, unless the activity is required as a condition of his or her regular judicial branch employment; or

(2) Contract on his or her own individual behalf as an independent contractor with any judicial branch entity to provide services or goods.

(d) [Multiple employment] This rule does not prohibit any person from being employed by more than one judicial branch entity.

Rule 6.104 of the California Rules of Court would be adopted effective January 1, 2004, to read:

Rule 6.104. Limitation on contracting with former employees

(a) [Trial and appellate court contracts with former employees] A trial or appellate court may not enter into a contract with a person previously employed by that court or by the Administrative Office of the Courts:

(1) For a period of 12 months following the date of the former employee's retirement, dismissal, or separation from service, if he or she was employed in a policymaking position in the same general subject area as the proposed contract within the 12-month period before his or her retirement, dismissal, or separation.

(2) For a period of 24 months following the date of the former employee's retirement, dismissal, or separation from service, if he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by the court or the Administrative Office of the Courts.

(b) [Administrative Office of the Courts contracts with former employees] The Administrative Office of the Courts may not enter into a contract with a person previously employed by it:

(1) For a period of 12 months following the date of the employee's retirement, dismissal, or separation from service, if he or she was employed in a policymaking position at the Administrative Office of the Courts in the same general subject area as the proposed contract within the 12-month period before his or her retirement, dismissal, or separation.

(2) For a period of 24 months following the date of the former employee's retirement, dismissal, or separation from service, if he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by the Administrative Office of the Courts.

1 (c) [Policymaking position] “Policymaking position” includes:
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3 (1) In a trial court, the court’s executive officer and any other position
4 designated by the court as a policymaking position;
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6 (2) In an appellate court, the clerk/administrator and any other position
7 designated by the court as a policymaking position; and
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9 (3) In the Administrative Office of the Courts, the Administrative
10 Director of the Courts, the Chief Deputy Director, any director,
11 and any other position designated by the Administrative Director
12 as a policymaking position.
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14 (d) [Scope] This rule does not prohibit any court or the Administrative
15 Office of the Courts from (1) employing any person or (2) contracting
16 with any former judge or justice.